

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LHF Productions, Inc.,

Plaintiff,

v.

DOE-174.65.13.50,

Defendant.

Case No.: 16cv1157-WQH-BGS

**ORDER GRANTING PLAINTIFF'S
EX PARTE MOTION FOR EARLY
DISCOVERY**

I. BACKGROUND

On May 13, 2016, Plaintiff, LHF Productions, Inc., filed a complaint against the John Doe subscriber assigned IP address 174.65.13.50 ("Defendant") for copyright infringement. (ECF No. 1). On May 13, 2016, Plaintiff filed an Ex Parte Motion for Expedited Discovery. In this motion, Plaintiff seeks leave to serve a third-party subpoena on the Internet Service Provider ("ISP"), Cox Communications, prior to the Rule 26(f) Conference in order to ascertain the name and address of the John Doe Defendant. (ECF No. 5.)

In its Complaint, Plaintiff asserts that it is the registered copyright holder of the motion picture *London Has Fallen*. (ECF No. 1 at ¶¶ 4-6). Plaintiff contends Defendant copied and distributed Plaintiff's copyrighted work through the BitTorrent file distribution network without Plaintiff's permission. (*Id.* ¶¶ 4-6, 11, 15.)

II. LEGAL STANDARDS

Formal discovery generally is not permitted without a court order before the parties have conferred pursuant to Federal Rule of Civil Procedure 26(f). Fed. R. Civ. P. 26(d)(1). “[H]owever, in rare cases, courts have made exceptions, permitting limited discovery to ensue after filing of the complaint to permit the plaintiff to learn the identifying facts necessary to permit service on the defendant.” *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)). Requests for early or expedited discovery are granted upon a showing by the moving party of good cause. *See Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal. 2002) (applying “the conventional standard of good cause in evaluating Plaintiff’s request for expedited discovery”).

“The Ninth Circuit has held that when the defendants’ identities are unknown at the time the complaint is filed, courts may grant plaintiffs leave to take early discovery to determine the defendants’ identities ‘unless it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds.’” 808 *Holdings, LLC v. Collective of December 29, 2011 Sharing Hash*, No. 12-cv-0186 MMA (RBB), 2012 WL 1648838, *3 (S.D. Cal. May 4, 2012) (quoting *Gillespie*, 629 F.2d at 642). “A district court’s decision to grant discovery to determine jurisdictional facts is a matter of discretion.” *Columbia Ins.*, 185 F.R.D. at 578 (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)).

District courts apply a three-factor test when considering motions for early discovery to identify Doe defendants. *Id.* at 578-80. First, “the plaintiff should identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court.” *Id.* at 578. Second, the plaintiff “should identify all previous steps taken to locate the elusive defendant” to ensure that the plaintiff has made a good faith effort to identify and serve process on the defendant. *Id.* at 579. Third, the “plaintiff should establish to the Court’s satisfaction that plaintiff’s suit against defendant could withstand a motion to dismiss.”

1 *Id.* (citing *Gillespie*, 629 F.2d at 642). Further “the plaintiff should file a request for
 2 discovery with the Court, along with a statement of reasons justifying the specific
 3 discovery requested as well as identification of a limited number of persons or entities on
 4 whom discovery process might be served and for which there is a reasonable likelihood
 5 that the discovery process will lead to identifying information about defendant that would
 6 make service of process possible.” *Id.* at 580.

7 **III. ANALYSIS**

8 **A. Plaintiff has Identified Missing Party with Sufficient Specificity**

9 First, Plaintiff must identify Defendant with enough specificity to enable the Court
 10 to determine that Defendant is a real person or entity who would be subject to the
 11 jurisdiction of this Court. *Columbia Ins.*, 185 F.R.D. at 578. This Court has previously
 12 determined that “a plaintiff identifies Doe defendants with sufficient specificity by
 13 providing the unique IP addresses assigned to an individual defendant on the day of the
 14 allegedly infringing conduct, and by using ‘geolocation technology’ to trace the IP
 15 addresses to a physical point of origin.” *808 Holdings*, 2012 WL 1648838, at *4 (quoting
 16 *OpenMind Solutions, Inc. v. Does 1-39*, No. C-11-3311 MEJ, 2011 WL 4715200 (N.D.
 17 Cal. Oct. 7, 2011); *Pink Lotus Entm’t, LLC v. Does 1-46*, No. C-11-02263 HRL, 2011
 18 WL 2470986 (N.D. Cal. June 21, 2011)).

19 With the Complaint and with the instant Motion, Plaintiff filed a chart reflecting
 20 that the user of the subject IP address engaged in allegedly infringing activity from April
 21 17 through May 2, 2016; identified the ISP as Cox Communications; and located the IP
 22 address in San Diego, California, within the Southern District of California. (ECF Nos.
 23 1-2; 5-3). Critically, Plaintiff also submitted the Declaration of James S. Davis in support
 24 of this Motion. (ECF No. 5-2). Mr. Davis states, under penalty of perjury, that the
 25 subject IP address belongs to Cox Communications and that he employed certain
 26 geolocation technology to locate the subject IP address within the Southern District of
 27 California. (*Id.*)

28 Plaintiff does not address, however, when the geolocation effort was performed. It

1 is most likely that the subscriber is a residential user and the IP address assigned by ISP
 2 is “dynamic.”¹ Consequently, it matters when the geolocation was performed. In the
 3 context of dynamic IP addresses, “a person using [an IP] address one month may not
 4 have been the same person using it the next.” *State of Connecticut v. Shields*, No.
 5 CR06352303, 2007 WL 1828875 *6 (Conn. Sup. Ct. June 7, 2007). If performed in
 6 temporal proximity to the offending downloads, the geolocation may be probative of the
 7 physical location of the subscriber. If not, less so, potentially to the point of irrelevance.
 8 Here, although Plaintiff does not provide the date that geolocation was performed, the
 9 Court notes that the alleged infringement allegedly occurred between April 17 through
 10 May 2, 2016, ending just weeks before the filing of the Complaint and the instant Motion.
 11 (ECF No. 1-2; 5-3). Accordingly, the geolocation appears to have been conducted close
 12 enough in time to the allegedly offending behavior to be probative.

13 Consequently, Plaintiff has identified the Defendant, at this point, with sufficient
 14 specificity. *See OpenMind Solutions*, 2011 WL 4715200, at *2 (concluding that plaintiff
 15 satisfied the first factor by identifying the defendants’ IP addresses and by tracing the IP
 16 addresses to a point of origin within the State of California); *Pink Lotus Entm’t*, 2011 WL
 17 2470986, at *3 (same). In addition, Plaintiff has presented evidence that the identified IP
 18 address is physically located in this district.

19 **B. Previous Attempts to Locate Defendant**

20 Plaintiff must describe all prior steps it has taken to identify the defendant in a
 21 good faith effort to locate and serve him or her. *See Columbia Ins.*, 185 F.R.D. at 579.
 22 Plaintiff states it has been able to identify the ISP used by the alleged infringer, where he
 23 or she is generally located, and the software used to commit the alleged acts of
 24 infringement. (ECF No. 5-2). Plaintiff appears to have obtained and investigated the
 25

26
 27 ¹ “Static IP addresses are addresses which remain set for a specific user. . . . Dynamic IP addresses are
 28 randomly assigned to internet users and change frequently. . . . Consequently, for dynamic IP addresses,
 a single IP address may be re-assigned to many different computers in a short period of time.” *Call of
 the Wild Movie, LLC v. Does*, 770 F. Supp. 2d 332, 356-57 (D. D.C. 2011)(citations omitted).

1 available data pertaining to the alleged infringement in a good faith effort to locate
 2 Defendant. *See OpenMind Solutions*, 2011 WL 4715200, at *3; *MCGIP, LLC v. Does 1-*
 3 *149*, 2011 WL 3607666, *2 (N.D. Cal. Aug. 3, 2011); *Pink Lotus Entm't*, 2011 WL
 4 2470986, at *3.

5 **C. Ability to Withstand a Motion to Dismiss**

6 “Finally, to be entitled to early discovery, [Plaintiff] must demonstrate that its
 7 Complaint can withstand a motion to dismiss.” *808 Holdings*, 2012 WL 1648838 at *5
 8 (citing *Columbia Ins.*, 185 F.R.D. at 579). In order to establish copyright infringement, a
 9 plaintiff must show: (1) ownership of a valid copyright, and (2) that the defendant
 10 violated the copyright owner’s exclusive rights under the Copyright Act. *Ellison v.*
 11 *Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004); 17 U.S.C. § 501(a). Here, the
 12 Complaint alleges that Plaintiff owns the registered copyright of the work that Defendant
 13 allegedly copied and distributed using the BitTorrent file distribution network and that it
 14 did not permit or consent to Defendant’s copying or distribution of its work. (ECF No.
 15 1). It appears Plaintiff has stated a prima facie claim for copyright infringement that can
 16 withstand a motion to dismiss.

17 **D. Personal Jurisdiction**

18 As discussed above, Plaintiff has sufficiently established that it is likely that the
 19 Defendant is located within the Southern District of California and is subject to the
 20 personal jurisdiction of the Court. (*See* section III(A), above.)

21 **E. Venue**

22 “The venue of suits for infringement of copyright is not determined by the general
 23 provision governing suits in the federal district courts, rather by the venue provision of
 24 the Copyright Act.” *Goldberg v. Cameron*, 482 F. Supp. 2d 1136, 1143 (N.D. Cal. 2007)
 25 (citing 28 U.S.C. § 1400(a); *Lumiere v. Mae Edna Wilder, Inc.*, 261 U.S. 174, 176
 26 (1923)). “In copyright infringement actions, venue is proper ‘in the district in which the
 27 defendant or his agent resides or may be found.’” *Brayton Purcell LLP v. Recordon &*
 28 *Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (quoting 28 U.S.C. § 1400(a)). “The

1 Ninth Circuit interprets this statutory provision to allow venue ‘in any judicial district in
2 which the defendant would be amenable to personal jurisdiction if the district were a
3 separate state.’” *Id.*

4 As discussed above, Defendant is likely to be located in this District and the acts
5 complained of also likely occurred here. Accordingly, venue appears proper in this
6 District at this time.

7 **F. Specific Discovery Request**

8 Plaintiff has not provided a proposed subpoena. Plaintiff stated, however, that it
9 will seek to obtain only the name and address of the subscriber associated with the IP
10 address from Cox Communications.

11 The Court finds Plaintiff has shown good cause to subpoena records from Cox
12 Communications identifying the subscriber assigned to the subject IP address at the
13 identified times. The subpoena must be limited to documents identifying the subscriber’s
14 name and address during the relevant period. That information should be sufficient for
15 Plaintiff to be able to identify and serve Defendant. If Plaintiff is unable to identify and
16 serve Defendant after receiving a response to the subpoena, Plaintiff may seek leave from
17 the Court to pursue additional discovery.

18 **G. Cable Privacy Act**

19 Finally, the Court must consider the requirements of the Cable Privacy Act, 47
20 U.S.C. § 551. The Act generally prohibits cable operators from disclosing personally
21 identifiable information regarding subscribers without the prior written or electronic
22 consent of the subscriber. 47 U.S.C. § 551(c)(1). A cable operator, however, may
23 disclose such information if the disclosure is made pursuant to a court order and the cable
24 operator provides the subscriber with notice of the order. 47 U.S.C. § 551(c)(2)(B). The
25 ISP that Plaintiff intends to subpoena in this case is a cable operator within the meaning
26 of the Act.

27 **IV. CONCLUSION**

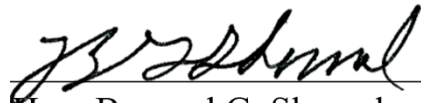
28 For the reasons set forth above, Plaintiff’s *Ex Parte* Motion for Expedited

Discovery is **GRANTED**, as follows:

1. Plaintiff may serve a subpoena, pursuant to and compliant with the procedures of Fed. R. Civ. P. 45, on Cox Communications seeking only the name and address of the subscriber assigned to the subject IP address for the relevant time period.
2. The subpoena must provide at least forty-five (45) calendar days from service to production. Cox Communications may seek to quash or modify the subpoena as provided at Rule 45(d)(3).
3. Cox Communications shall notify its subscriber, no later than fourteen (14) calendar days after service of the subpoena, that his or her identity has been subpoenaed by Plaintiff. The subscriber whose identity has been subpoenaed shall then have thirty (30) calendar days from the date of the notice to seek a protective order, to move to quash or modify the subpoena or file any other responsive pleading.
4. Plaintiff shall serve a copy of this Order with the subpoena upon Cox Communications. Cox Communications, in turn, must provide a copy of this Order along with the required notice to the subscriber whose identity is sought pursuant to this Order.
5. No other discovery is authorized at this time.

IT IS SO ORDERED.

Dated: May 20, 2016


Hon. Bernard G. Skomal
United States Magistrate Judge